

## RECENT DEVELOPMENTS

### IMPEACHMENT OF THE ACCUSED BY PRIOR CRIMINAL CONVICTIONS

*State v. Murdock*

172 Ohio St. 221, 174 N.E.2d 543 (1961)

Murdock was convicted of driving while under the influence of intoxicating liquor<sup>1</sup> in the Berea Municipal Court. During the cross-examination of Murdock, the prosecution was permitted to question the accused about a prior conviction under the same statute. The Cuyahoga County Court of Appeals affirmed the conviction, but certified the case to the Ohio Supreme Court because of a conflict with a decision of the Erie County Court of Appeals.<sup>2</sup> In a unanimous opinion the Supreme Court of Ohio affirmed the conviction and held that the prior conviction was within the scope of section 2945.42<sup>3</sup> and might be used to impeach the credibility of the accused.

At common law, a witness was disqualified from testifying if he had been convicted of treason, a felony or a misdemeanor involving dishonesty or falsehood.<sup>4</sup> Such disqualification has been generally abrogated by statutory enactments,<sup>5</sup> and the fact of a prior conviction now goes to the weight of the testimony. The Ohio statute removing the disqualification of a witness in a criminal prosecution for prior criminal conviction has undergone only minor revisions since its first enactment.<sup>6</sup> The interpretation given the statute by the Ohio court is not uncommon.<sup>7</sup> However, the largest number of jurisdictions hold that the removal of the disqualification means the witness may be impeached only by crimes of moral turpitude; others allow impeachment for infamous crimes. Other jurisdictions adopt a view similar to that of Ohio or leave the decision as to what convictions may be used for impeachment to the discretion of the trial judge.<sup>8</sup> The Model Code of Evidence suggests that unless the accused attempts to establish his credibility on the witness stand, he may not be impeached in this manner.<sup>9</sup>

The ruling of this court that all crimes, either felonies or mis-

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<sup>1</sup> Ohio Rev. Code § 4511.19 (1953).

<sup>2</sup> *State v. Hickman*, 102 Ohio App. 78, 141 N.E.2d 202 (1956).

<sup>3</sup> "No person is disqualified as a witness in a criminal prosecution . . . by reason of his conviction of crime . . . such . . . conviction may be shown for the purpose of affecting the credibility of such witness."

<sup>4</sup> McCormick, Evidence § 43 (1954).

<sup>5</sup> *Ibid.*

<sup>6</sup> 66 Ohio Laws 308 (1869).

<sup>7</sup> McCormick, *op. cit. supra* note 4.

<sup>8</sup> *Ibid.*

<sup>9</sup> Model Code of Evidence, rule 106 (1942).

demeanors for which statutes provide penalties,<sup>10</sup> may be used to affect the credibility of the accused *affirmatively* settles the rule in Ohio. In two prior decisions, *Harper v. State*<sup>11</sup> and *Coble v. State*,<sup>12</sup> the court had stated what convictions could *not* be used for the purpose of impeachment. In the *Harper* case the court held conviction under a city ordinance prohibiting purse-snatching could not be used. This was based directly on the *Coble* case in which the prosecution had attempted to use convictions under city ordinances for impeachment. The court said, "[T]he conviction referred to in this section (66 Ohio Laws 308) which may be shown for the purpose of affecting credibility, is such and such only as before the enactment of the section would have disqualified the person from testifying as a witness."<sup>13</sup> The court's interpretation of the statute in the instant case has broadened the *Coble* rule.<sup>14</sup> Before this decision, it seemed Ohio would apply, for the purposes of impeachment, a rule which permitted using only those offenses which had formerly disqualified a witness in a criminal prosecution.<sup>15</sup> There is no Ohio statute pertaining to witnesses in a civil case parallel to section 2945.42,<sup>16</sup> and the opinion of the court fails to indicate how it would rule in a civil action.<sup>17</sup>

The Ohio rule as announced in this case has the virtues of certainty and ease of application.<sup>18</sup> The common law had made the issue of correlation between crime and credibility in part a question of law; whereas, the new Ohio rule gives the question to the jury. Now the jury must decide what effect prior convictions for all state and federal crimes have upon the credibility of the accused.

Some critics contend that a jury might tend to convict the accused on his record regardless of his substantive innocence in the present trial.<sup>19</sup>

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<sup>10</sup> *State v. Rose*, 89 Ohio St. 383, 106 N.E. 50 (1914); *State v. Cameron*, 89 Ohio St. 214, 106 N.E. 28 (1914).

<sup>11</sup> *Harper v. State*, 106 Ohio St. 481, 140 N.E. 364 (1922).

<sup>12</sup> *Coble v. State*, 31 Ohio St. 100 (1876).

<sup>13</sup> *Id.* at 102.

<sup>14</sup> *August v. Finerty*, 30 Ohio C.C.R. 330 (1908) argues that such conviction before the enactment of the statute was defined by the traditional common law, and anything else would be in contravention of the constitution.

<sup>15</sup> *Kornreich v. Industrial Fire Insurance Co.*, 132 Ohio St. 78, 5 N.E.2d 153 (1936) held that a witness may be cross-examined as to confession to a crime, as a confession voluntarily given is like a conviction. Until the *Murdock* case, this was the most recent pronouncement of the court on the issue and it was this case that was followed by the Erie court in the *Hickman* case, *supra* note 2. In dicta, with three members of the present court concurring, the court said cross-examination should be limited to treason, felony, and *crimen falsi*.

<sup>16</sup> Ohio Rev. Code § 2317.01, provides who may be a witness.

<sup>17</sup> The *Kornreich* case, *supra* note 16, was a civil case, and its authority is diminished by the *Murdock* decision.

<sup>18</sup> *McCormick, op. cit. supra* note 4.

<sup>19</sup> Ladd, "Credibility Tests—Current Trends," 89 U. Pa. L. Rev. 166, at 190, (1940); *McCormick, op. cit. supra* note 4.

As a result, the accused will refuse to take the stand for fear of prejudicial cross-examination,<sup>20</sup> with a resulting injustice.<sup>21</sup> Avoiding this injustice is the aim of the Model Code of Evidence which does not allow such impeachment unless the accused attempts to establish his credibility.<sup>22</sup>

It is unlikely that we will be able to learn whether juries do tend to convict on the record and are unable or unwilling to differentiate between the issues of guilt and the credibility of the witness.<sup>23</sup> It would seem a jury might try to convict a man on his record if his offenses were in extreme discord with the community sense of morality. Repetitive crimes such as in the present case might add to the weight of evidence against the accused which is considered by the jury.

One of the foundations of our society is the protection of the innocent, and our law declares that the accused is innocent until his guilt is proven. However, the protection of society is also a goal of the judicial system. Every reasonable safeguard should be used to guarantee the accused his "day in court." If the accused may not be impeached by prior criminal conviction unless he makes an issue of his credibility, society runs the risk that such convictions do affect credibility, and a guilty defendant may escape prosecution. Any rule less favorable to the accused, however, runs the same risk of injustice as the present rules.<sup>24</sup> Until the correlation of credibility and conviction of crime is established, a rule like that of Ohio gives a maximum protection to society if not the individual.

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<sup>20</sup> Ladd, *Id.* at 191.

<sup>21</sup> *Adamson v. California*, 332 U.S. 46 (1947) shows this is not such an injustice as to offend due process.

<sup>22</sup> Model Code of Evidence, *op. cit. supra* note 10, comment 3 to rule 106.

<sup>23</sup> The premise that a conviction affects the credibility of an accused is attacked by Professor Ladd, *op. cit. supra* note 19. He points out that this impeachment differs from other types. Perhaps the Ford Foundation-University of Chicago study will produce information on the jury's basis of decision, but as yet it is not available.

<sup>24</sup> Except in the number of cases in which the issue of repetition would be excluded from jury consideration.